Supreme Court, U.S.
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No. 93-570

In The

Supreme Court of the United States

October Term, 1993

PATRICIA LANDGRAF,

Petitioner,

v.

McDONNELL DOUGLAS HELICOPTER COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, McDonnell Douglas Helicopter Company, restates the questions presented as follows:

1. Whether there was any evidence that the design of the OH-6 helicopter failed to conform to reasonably precise specifications approved by the Army.

2. Whether conformity will be measured against a lower tier, precatory specification, in the event of a conflict between the lower tier specification and the detail specification and/or evidence of an election by the Army of a design in conflict with such lower tier specification.

3. Whether there is a special or important reason demonstrated in Petitioner's Petition for Writ of Certiorari sufficient to support granting of same, to include:

> a. Whether the United States Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decisions of this Court or another United States court of appeals on the same matter; or,
>
> b. Whether the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Rules of the Supreme Court of the United States, Rules 15, 24 and 29.1, McDonnell Douglas Helicopter Company states that since its last disclosure on July 28, 1992, McDonnell Douglas Helicopter Company has begun doing business as McDonnell Douglas Helicopter Systems. McDonnell Douglas Helicopter Company d/b/a McDonnell Douglas Helicopter Systems is a wholly owned subsidiary of the McDonnell Douglas Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, McDonnell Douglas Helicopter Company, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is attached to Petitioner's brief as Appendix No. 2.

STATEMENT OF THE CASE

This case arises from the crash of an Army OH-6C helicopter. The manufacturer of that helicopter was Hughes Tool Company – Aircraft Division ("Hughes"), now McDonnell Douglas Helicopter Company

("MDHC"). Plaintiff has alleged certain causes of action against MDHC related to the design of that helicopter. MDHC moved for summary judgment on the basis of the government contractor's defense as annunciated by this Court in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988).

In *Boyle* the Court determined that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function . . . " *Boyle*, 487 U.S. at 511. The Court concluded that "second-guessing" of those decisions through tort suits should not be permitted and that state law holding contractors liable for design defects in military equipment should be displaced. The Court cited the following as elements of the government contractor defense:

1. That the United States approved reasonably precise specifications;
2. That the equipment conformed to those specifications; and
3. That the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier, but not to the United States.

Boyle, 487 U.S. at 512.

Summary judgment, in favor of MDHC, was granted and subsequently affirmed by the United States Court of Appeals for the Sixth Circuit. *Landgraf v. McDonnell Douglas Helicopter Company*, 993 F.2d 558 (6th Cir. 1993).

There is no dispute in this case as to the first and third elements of the government contractor's defense. The sole question at issue here is whether the subject

helicopter conformed to the reasonably precise specifications approved by the United States.

The crash in question occurred following an apparent engine failure or other loss of power. During a power-off emergency descent (known as autorotation), one of the main rotor blades of the subject helicopter contacted the tail boom. The tail boom subsequently separated from the aircraft.

At issue is military specification MIL-S-8698, *Structural Design Requirements, Helicopters* (usually spoken "mil spec 86 98"). (JA: 282). That specification was incorporated by reference into the detail specification, *Detail Specification for a Single Engine, Single Main Rotor Light Observation Helicopter Army Model Designation OH-6A* ("Detail Specification"). (JA: 045).

MIL-S-8698 contains the following language: "During operation in all flight regimes, the clearance between main rotor blades and other parts of the helicopter shall be not less than 9 inches, preferably 12 inches. . . . The design of the rotors shall be such as to preclude the possibility of the blades striking each other or any part of the helicopter." (JA: 288).

It is Petitioner's contention that because the helicopter in question was struck by its own rotor, it did not comply with MIL-S-8698 and therefore did not comply with the detail specification. Respondent disputes Petitioner's statement on page 10 of her Petition for Writ of Certiorari where she states that it is uncontroverted that the helicopter did not comply with MIL-S-8698.

In order to understand the issue of whether the helicopter conformed to reasonably precise specifications approved by the United States, it is necessary to understand the two referenced specifications.

***Detail Specification for a Single Engine, Single Main Rotor Light Observation Helicopter Army Model Designation OH-6A* (JA: 045)**

This specification, hereinafter "Detail Specification," is the document that contains the precise specifications for the manufacture of the OH-6 helicopter. It is nearly 200 pages long and incorporates the results and experience of an extensive joint development program, conducted by the Army, Hughes and the FAA. That development program spanned several years and included nearly 5,000 hours of flight testing. (JA: 027 – 33, Affidavit of Charles Crawford; R: 36b., MDHC Motion for Summary Judgment, Exhibits D, E, H & I). The Detail Specification reflects many changes and modifications to the initial design and to the prototype helicopters required by the Army to improve the helicopter's mission capability, increase its reliability and reduce its operating costs.

The Detail Specification prescribes the exact configuration and dimensions of the OH-6 helicopter, the materials to be used, the construction processes, the configuration and the performance criteria for the finished product. Once that document was approved and the production contract awarded to Hughes, the specifications contained in the Detail Specification were frozen. No deviation or change could take place unless approved and ordered by the Army. (JA: 032 – 33).

The Detail Specification includes, among other things, specifications for the length and width of the main rotor blades, the manner they were to be attached to the main rotor hub, the materials they were to be made of, the manner of design, construction and operation of the main rotor flapping hinges and blade restrainers, the main rotor operating speeds, operating and design limitations for the main rotor system, the configuration of the tail boom and airframe, and all dimensional criteria for the aircraft. (JA: 116 – 25). Although the Detail Specification does not address directly the minimum clearance of the main rotor blades from the rest of the aircraft during flight operations, those clearances are determined by the detailed configuration and construction criteria contained therein.

It was the Detail Specification against which the helicopter was checked for conformity by the Army. (JA: 033). The aircraft was inspected throughout production by Army personnel and at the time of delivery. (JA: 033). The helicopter was accepted by the Army only after it was determined to be in compliance with the Detail Specification. (JA: 033, 265).

Charles Crawford was Deputy Project Manager for the development and procurement of the OH-6 helicopter for the Army. He was responsible for, among other things, the development of the technical specifications for the OH-6. During the process, he became Chief of the Development and Qualifications Division of the Army Aviation Systems Command (AVSCOM) and later Technical Director of AVSCOM. In his affidavit, (JA: 027), Mr. Crawford explains the system of specifications for aircraft contracts, as outlined above.

The Detail Specification incorporates by reference 35 other documents, including the Civil Air Regulations, Military Specifications and Army Regulations. Another 59 documents are incorporated in the appendices, including 22 additional military specifications. Military Specification MIL-S-8698, at issue here, is included among the 41 different military specifications incorporated.

There is no evidence nor is there any contention that the subject helicopter did not fully comply with the specific and detailed requirements of the Detail Specification, itself. The helicopter that is the subject of this suit was inspected and accepted by the Army as complying with those specifications. (JA: 033, 263, 265) Petitioner's contention of non-conformance is based on her allegation that the helicopter did not comply with a particular lower tier specification, MIL-S-8698.

***Military Specification, MIL-S-8698 Structural Design Requirements, Helicopters* (JA: 282)**

MIL-S-8698 was promulgated by the Navy and approved by the Air Force in 1954, more than six years before the OH-6 program began. It contains general design criteria applying to all helicopters, from the smallest observation helicopters to the largest, multi-engine, multi-rotor cargo helicopters. It contains both general criteria such as "sufficient strength shall be provided . . . " and more specific goals such as the 9 – 12 inch main rotor clearance that is at issue here.

MIL-S-8698 continued in force for at least 27 years, with only a minor change referencing an additional specification regarding noise levels and insulation.

Petitioner contends that because MIL-S-8698 was incorporated into the Detail Specification, the 9 – 12 inch main rotor clearance discussed therein was required on the OH-6 helicopter. As evidence that the OH-6 did not conform to that requirement, Petitioner offers only the fact that at some time during the crash sequence a main rotor blade did come into contact with the tail boom of the subject aircraft.

It is Respondent's position that the helicopter fully complied with MIL-S-8698 and that the blade on the subject helicopter struck the tail boom only after flight and rotor conditions seriously exceeded the operational design parameters of the aircraft. In fact, Petitioner's own expert testified that in most of the helicopters he knows about, the main rotor can strike the airframe and that the various design differences merely increase or decrease the vulnerability of the aircraft to such strikes. (JA: 324 – 25, Deposition of John Cochran). However, it is not necessary to ascertain whether the OH-6 complied with MIL-S-8698 to determine that the decisions of the courts below were correct.

SUMMARY OF THE ARGUMENT

The subject helicopter fully conformed to the "reasonably precise specifications" approved by the United States. The specification with which conformity was required was the Detail Specification. MIL-S-8698 is a lower tier, precatory specification, not the ultimate design specification with which conformance must be measured.

If, for the sake of argument, it is assumed that the OH-6 did not comply with the subject provision of MIL-S-8698, it is also true that such deviation with MIL-S-8698 was the direct result of conformity with the Detail Specification. In the instance of such a conflict, the Detail Specification would control, and would still be the specification against which conformity must be measured. (JA: 032).

The holding of the Sixth Circuit in this matter is in accord with established case law on the specific issue presented in this case. There are no conflicts with other decisions, nor is there any other special or important reason justifying the granting of a Writ of Certiorari in this case.

REASONS THE WRIT SHOULD NOT BE GRANTED

This issue has been previously addressed in *Kleeman v. McDonnell Douglas Corporation*, 890 F.2d 698 (4th Cir. 1989), *cert. denied* 495 U.S. 953 (1990). In *Kleeman* the court held that the precatory goals developed for the product at the start of the procurement process do not establish the "reasonably precise specification" to which the product must conform.

Captain Kleeman was fatally injured when the landing gear on his F/A-18 aircraft failed during landing. His surviving spouse contended that the landing gear did not conform to specifications because MIL-S-8863A, incorporated into the detail specification for the F/A-18 required that the landing gear withstand normal landing loads

without bending, unlocking or causing uncontrolled motion of the aircraft.

"[T]he operative question was whether the product conformed to the 'ultimate design specification,' not qualitative, precatory specifications used in the procurement process." *Kleeman*, 890 F.2d at 700. "The ultimate design of the product is determined not only by the original procurement and contract specifications, but also by specific, quantitative engineering analysis developed during the actual production process." *Id.* at 702.

"[A] product conforms to reasonably precise specifications if it satisfies 'an intended configuration' even if it 'may produce unintended and unwanted results.' " *Id.* at 703, *citing Harduvel v. General Dynamics Corporation*, 878 F.2d 1311, 1317 (11th Cir. 1989), *cert. denied* 494 U.S. 1030. In this instance, the OH-6 helicopter conformed to the ultimate specification for that helicopter, as required by the Detail Specification. The fact that MIL-S-8698 is a specification with detail does not elevate it to the Detail Specification, the reasonably precise specification approved by the Army for the OH-6.

The *Kleeman* court recognized the dilemma created by the typical government contract incorporating a number of guidelines and specifications applied generally to the design of military products. That court determined that as a matter of law, the final detailed specification for the particular product itself governed and would be the specification against which conformity would be measured. The fact that one or more of the incorporated specifications may be specific or detailed cannot permit it to control the ultimate design selected by the procuring

agency. Whether lower tier specifications incorporated by reference are broad and general or precise does not change the fact that they are precatory specifications used to guide the general procurement process. Whether the ultimate design choice conforms to the precatory specifications or not, it is that ultimate design, as embodied in the Detail Specification, that governs the contractual requirements and responsibilities of the contractor.

It is important to remember that Petitioner's complaint is about the *design* of the OH-6. There is no evidence and no complaint of a manufacturing defect. Every aspect of design specific to the OH-6 helicopter is contained within the Detail Specification.

MIL-S-8698 is concerned only with general design issues in military helicopters and is not addressed to any specific branch of service, design or helicopter. MIL-S-8698 specifies that the design of rotor systems should be such that clearance between the main rotor blades and other parts of the helicopter will be not less than 9 inches. However, it is the Detail Specification, as approved by the Army, that provides the *actual* design requirements for the OH-6 helicopter. It is the Detail Specification that determines the *actual* clearances between the rotor system and other parts of the helicopter for the OH-6 helicopter.

The Detail Specification provided the specific design, construction, material, dimensional and configuration requirements for the OH-6 helicopter. The contractor was not free to deviate from the Detail Specification, absent Army approval and order. (JA: 032 – 33). If the OH-6 failed to conform with rotor clearance dimensions contained in MIL-S-8698, such non-conformance would be

the result of the helicopter's conformance with the Detail Specification. (To put it another way – Assuming that the OH-6 did not comply with the separation requirements of MIL-S-8698, Hughes could not change the design of the helicopter to achieve the greater clearance [raising the height of the main rotor mast, for example], unless the Army directed such a design change. In other words, Hughes was stuck with the design details contained within the Detail Specification, whether they produced a helicopter that conformed to the lower tier specifications or not and only the Army had the power to cause the design to be changed.)

At worst, there is a conflict between the Detail Specification and MIL-S-8698. In that instance, the requirements of the Detail Specification would prevail. The fact that the specific will govern the general is common sense, the holding of *Kleeman*, and the specific understanding of the Army. (JA: 032).

Finally, the Army was well aware of the fact that the potential existed for the main rotor of the OH-6 to strike the tail boom. Since they knew this fact, and since they continued to require Hughes to produce and deliver the helicopter in strict compliance with the Detail Specification, it is obvious that the Army either:

1. Knew that the condition(s) that make such strikes possible are beyond the operational parameters contemplated by MIL-S-8698 (therefore, such strikes were not indicative of non-conformance); or

2. Did not consider the non-conformance, if any, with the lower tier specifications to be

non-conformance with the Detail Specification.

Either way, the Army knowingly continued for many more years to procure and accept the OH-6 helicopter with this condition or potential. It is clear that the Army exercised its discretion and for its own reasons, determined that the design of the OH-6 helicopter, even with the potential for such blade strikes, was nevertheless conforming to the Detail Specification.

Petitioner argues that the Army may have believed that the potential for such rotor strikes existed only during certain landing conditions and that there is a fact issue regarding whether the Army consented to such reduced clearance during flight operations. (For a discussion of the background and testing regarding certain blade strikes to the tail boom, see Main Rotor Blade Motion Study, JA: 244 – 61.) This, and related arguments, are merely an exercise in "what if," and are not only not relevant but are wholly contradicted by the evidence. The Army published a warning in the Operator's Manual for the OH-6, TM 55-1520-214-10, that stated that a rotor strike on the tail boom could be induced by certain abrupt and erratic actions. (JA: 268.) That warning is contained in Paragraph 8-8 of the Operator's Manual, "Power On Descent." It is clear from that warning that there were some conditions during which the main rotor could strike the tail boom, *including in flight*, and that the Army knew it.

Following the Main Rotor Blade Motion Study, Hughes recommended that certain design changes be tested for incorporation into the following year's product

improvement program. (JA: 040, 250). Yet, as noted by the courts below, the Army nevertheless continued to purchase the OH-6 without further testing or additional design changes in this area.

In putting the lower tier specifications into perspective (particularly in the context of the OH-6), it might be helpful to note the brief historical background of the procurement process and the selection of the "unconventional design" of the OH-6. (JA: 027 – 33). The Army was interested in the OH-6, in part, because of its small shape and size, its compactness. The design was so unconventional that the Navy (which was originally conducting the selection board) rejected the design outright as "high risk." It was only after a minority paper was filed by an Army board member that the Secretary of Defense directed the board to reconvene and consider the Hughes design. After competitive analysis and testing, the OH-6 design was selected by the Army.

It is clear from this history that the design of the OH-6 did not necessarily conform with the traditional design parameters previously established by the Navy and embodied in MIL-S-8698. It is also clear that the Army, for its own reasons, preferred this unconventional design and that it did not intend that the OH-6 necessarily follow those traditional design criteria. The Army's faith in this design and willingness to depart from the then-prevailing design parameters proved to be justified by the subsequent success and long service life of the OH-6. (JA: 033).

Petitioner must "do more than simply show that there is some metaphysical doubt as to the material

facts." *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Petitioner "must come forward with specific facts showing that there is a genuine issue for trial," *Id.* at 587, *citing* Rule 56(e), FRCP. Respondent was required to adduce more than a scintilla of evidence to overcome the motion for summary judgment. *Street v. J.C. Bradford & Company*, 886 F.2d 1472, 1479 (6th Cir. 1989).

There is no evidence whatsoever that the subject helicopter failed to conform to the design requirements of the Detail Specification. It is clear that the Detail Specification is the "reasonably precise specification" with which the helicopter must conform under *Boyle*. The existence of and/or a conflict with an underlying, lower tier, precatory specification does not change that fact. *Kleeman*, supra.

Further, there is no evidence that the helicopter failed to conform with MIL-S-8698 either. Failure of performance does not "equate as a matter of law with the absence of conformity" under *Boyle*. *In re Aircraft Crash Litigation Frederick, Maryland, May 6, 1981*, 752 F.Supp. 1326 (S.D. Ohio 1990), *aff'd* 935 F.2d 269 (6th Cir. 1991), *citing Kleeman*, 890 F.2d at 700.

MIL-S-8698 requires a certain main rotor clearance during operation in flight regimes. There is much evidence in this case that at the time of this accident, the main rotor speed, and other conditions, were well outside the design envelope for this helicopter. Petitioner's own expert admitted that in some circumstances, most of the helicopters of which he is aware have the potential for a blade to strike some part of the aircraft. (JA: 324). A lack

of blade clearance in conditions and circumstances clearly outside the design parameters of the aircraft can hardly be called non-conforming. While this information, by itself, may not be conclusive, the fact remains that the mere occurrence of an accident does not prove non-conformity, and that there has been no evidence, other than the accident itself, presented that the OH-6 has failed to conform to MIL-S-8698.

Petitioner argues for strict construction of the government contractor's defense and would have a jury determine, after the fact, exactly what the Army knew and/or intended. She would place the jury in the position of resolving the conflicts, if any, between the Detail Specification and the lower tier specifications. This is exactly the situation that the government contractor's defense is intended to avoid.

In formulating the government contractor's defense, the Court clearly stated that liability for design defects in military equipment cannot be imposed when conditions assure that the suit is within the area where the policy of discretionary function would be frustrated. *Boyle*, 487 U.S. at 512.

"Courts are ill equipped to make military judgments, whatever a plaintiff's theory of recovery." *Tozer v. LTV Corporation*, 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied* 487 U.S. 1233. "[T]he reservation of judicial judgment on strictly military matters is sound policy." *Tozer*, 792 F.2d at 405.

CONCLUSION

The design for the OH-6 helicopter was approved by the Army, after considerable participation by both Hughes and the Army. The ultimate design of the OH-6 is embodied in the Detail Specification and it is only against that design document that conformance may be measured. There is considerable evidence that the subject OH-6 helicopter fully conformed to the ultimate design specification and was so accepted by the Army. There is no evidence that the OH-6 helicopter failed to conform in any way with either the Detail Specification or with MIL-S-8698; however, to the extent that there may be any conflict between the Detail Specification and MIL-S-8698, a lower tier specification, the Detail Specification prevails. MDHC has established its entitlement to the government contractor's defense.

The case was correctly decided below, in accordance with *Boyle* and *Kleeman*. There are no decisions in conflict with the decisions of this Court or another United States court of appeals on the same matter.

It is submitted that there is no reason to grant a writ in this case, and that the Court should therefore deny certiorari.

Respectfully submitted,

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